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Supreme Court of the United States

OCTOBER TERM, 1940

No. [illegible]

HERBERT ROSENGARTEN,

vs.

UNITED STATES.

DAVID ROSENGARTEN,

vs.

UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

[illegible]
[illegible]
15 [illegible]
New York, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

HERBERT ROSENGARTEN,
Petitioner,
v.
UNITED STATES,
Respondent
and
DAVID ROSENGARTEN,
Petitioner,
v.
UNITED STATES,
Respondent.

No. ....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Claims, entered in the above entitled cases on March 2, 1960.

Citation to Opinion Below

The opinion of the United States Court of Claims rendered on March 2, 1960, printed in Appendix "A", infra, has not yet been officially reported.

NOTE: Unless otherwise indicated, references in parenthesis preceded by letter "R" are to certified Record of the Court of Claims.

Jurisdiction

The judgment of the United States Court of Claims was entered on March 2, 1960 (R. 31, 49). A timely petition for rehearing, printed in the Appendix "A", infra (pp. 24a) was denied on May 4, 1960 (R. 69). The jurisdiction of this Court is invoked under 28 U. S. Code, Section 1254(1). The jurisdiction of Court of Claims was invoked under 28 U. S. Code, Section 1346(a).

Questions Presented

1. In a case where it is conceded two taxpayer-partners have overpaid their income taxes, does the timely mailing of claims for refund for two consecutive years involving an identical issue meet the requirements of Section 322 of the Internal Revenue Code of 1939, where the District Director denies receipt of said claim for refund for one of the years for the two partners but acknowledges receipt of claim for both years on the same issue from a third partner?

2. Did Trial Court's exclusion of oral testimony and written evidence offered to prove the general loss of claims for refund by the very office of the Collector (now the District Director) of Internal Revenue which denied receiving the claims of the taxpayer here in question deprive the taxpayer of due process of law?

Statutes Involved

Pertinent provision of the United States Internal Revenue Code of 1939 applicable to this proceeding are:

"Section 322. Refunds and Credits

(a) Authorization.—

(1) Overpayment—Where there has been an overpayment of any tax imposed by this chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof, then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) Limitation on Allowance.—

(1) Period of limitation.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. * * *

Statement

Petitioners are individuals who together with their brother, Walter, now deceased, were members of a partnership, the Herbert Manufacturing Company. Their wives and children became partners in 1941 when the three senior partners gave them interests in the partnership.

Upon the examination of Federal income tax returns for 1944 and 1945, the Revenue Agent in reports dated June 13, 1947, refused to recognize the partnership interests of the wives and children and allocated partnership profits solely among the three brothers. The resulting deficiencies were assessed and paid by the three brothers.

Claims for refund for 1944 and 1945 were filed by the petitioners here on February 7, 1950 and on behalf of Walter (deceased February 10, 1946) by his Estate on March 3, 1950.

The claims for refund for all parties were examined together by the Revenue Agent who upon a reappraisal of the facts and change in judicial climate concluded the family partnership was valid and reallocated the partnership income in proportion to their respective interests.

The claims for refund filed for Walter for 1944 and 1945 were allowed as were the claims for Herbert and David for 1944. The Revenue Agent determined that overassessments of $34,837.90 and $10,104.38 were due Herbert and David, respectively, for 1945 but disallowed the refunds for that year on the ground they were barred by the Statute of Limitations, there being no record of the filing of timely claims for 1945.

The admitted and found facts are:

1. Claims for refund for 1944 and 1945 were prepared for petitioners, Herbert and David Rosengarten in pencil and thereafter typed in duplicate for each year (Fact 16, R. 27, 45, 46);

2. Claims for 1944 and 1945 were signed by the respective petitioners, notarized and thereafter placed in duplicate in two separate envelopes properly addressed to the Collector of Internal Revenue with postage placed thereon (Fact 18) (R. 46, 47, see also R. 34);

3. Rossman, the accountant for petitioners, stated he put the envelopes in his pocket and when he went out to lunch, put them in a mail box on the corner (Tr. 53, R. 47);

4. The claims for refund for 1944 of Herbert and David were received by the Collector of Internal Rev

enue on February 7, 1950 (Fact 19; R. 47) but a search of the Collector's records in 1953 failed to disclose receipt of the refund claims for 1945 (Fact 20, R. 47).

The Court of Claims in a three to two decision held petitioners failed to prove filing of claims for refund for 1945 in the light of defendant's evidence concerning step-by-step treatment of incoming mail, the handling process of claims for refund and indexing and registry procedures.

Petitioners tried to introduce oral and written evidence to rebut the testimony of defendant's witness to prove loss of claims by the very same Collector's Office despite said "fool-proof" procedures, but said evidence was held to be inadmissable. Petitioners allege said ruling was arbitrary and erroneous and deprived petitioners of due process of law since it pertained to the very heart of the issue.

Petitioners further contend the nature and circumstances of the tax adjustments were such that the Government had notice through the claims for refund for 1944 of Herbert and David and for 1944 and 1945 of Walter that petitioners had overpaid their taxes for 1945 and such claims were perfected when "amended" claims for refund covering both 1944 and 1945 were filed in 1953 and 1954.

These circumstances are (1) a single issue, viz: validity of family partnership; (2) Revenue Agent's examination of 1944 and 1945 Federal income tax returns of all three brothers at the same time with a common adjustment for both years; (3) examination of Claims for Refund of all three brothers at the same time, for one of whom the Revenue Agent had claims for both years, and from prior records the Internal Revenue Bureau knew the adjustment to be made was applicable to both 1944 and 1945. In fact, the Revenue Agent made the determination of overassessments for 1945 for David and Herbert, which were held to be barred by the Statute of Limitations.

The Court of Claims rejected this contention of petitioners stating they were aware of no case so holding.

Reasons for Granting the Writ

I.

The issue in this case involves a Federal question of ever present and increasing importance in the administration of the internal revenue. Several hundred thousands of claims for refund are filed each year, most of which are sent through the mails. Upon whom the burden shall ultimately fall where claims are mailed, but the District Director has no record of receipt, must be resolved by this Court if any stability is to attach to legal counsel as well as governmental administration.

II.

The divided opinion (3 to 2) of the Court below is in direct conflict with appellate court decisions in *Jones v. United States*, (C.A.-9) (1955) 226 F. 2d 24, *Crude Oil Corp. v. Commissioner of Internal Revenue*, (C.A.-10) (1947) 161 F. 2d 809, and *Detroit Automotive Products Corp. v. Commissioner of Internal Revenue*, (C.A.-6) (1953) 203 F. 2d 285, as well as United States District Court in *Hudson v. United States* (1950) 92 F. Supp. 555.

The divided opinion (3 to 2) of the Court below is the first case decided adversely to the taxpayer on this issue.

III.

The majority opinion of the United States Court of Claims in this proceeding is believed to be clearly erroneous.

leads to a most inequitable result," and is based upon a "violent" supposition. The evidence is quite firm and the Court below has found that claims for refund for 1944 and 1945 for the three partners, Herbert, David and Walter Rosengarten were prepared in pencil at the same time, typewritten in duplicate, and signed on February 6, 1950 by Herbert and David. Claims for refund for Walter were held in the accountant's office until the beginning of March, when Walter's widow came in to sign the claims.

In Fact No. 18 the Court below also found that after the claims for refund of Herbert and David for both 1944 and 1945 were signed, Rossman the accountant, "picked up the documents, requested the secretary to address two envelopes to the Collector of Internal Revenue, separated the documents and put them in such envelopes." Rossman had testified that the eight claims for refund (two taxpayers, two years, in duplicate), together with supporting schedules were too bulky to put into one envelope (Transcript p. 40, 41). After stamping the envelopes, Rossman testified he put them in his pocket and when he went out to lunch put them into a mail box on the corner (Tr. 53. See also Fact 18). There is no evidence contradicting the facts as set out.

The majority of the Court in its opinion stated (p. 5) "His (Rossman's) recollection as to which documents were placed in which envelopes, the manner of affixing the stamps and where and when he mailed the envelopes, is far less categorical." Yet Rossman's uncontradicted and unimpeached testimony was he obtained the stamps from the taxpayers' secretary, he believed he personally put the stamps on the letters, and "mailed them in a box on a

"It is with reluctance that we hold as we must in view of the admitted rights of the plaintiffs, but for the failure of filing, to the claim before this Court. This is all the more so since they themselves are not responsible for the forfeiture of the refund."

street corner * * * on about 30th Street and Seventh Avenue, New York * * * during my lunch hour * * * before (lunch)" (Tr. 53).

The only point about which Rossman was uncertain was the separation of the claims for refund into two envelopes. He had taken the eight claims (two taxpayers, two years in duplicate) and put four of the claims into each envelope. The testimony was as follows:

> "Q. When you put the documents into these envelopes, what documents did you put in each one? A. I did not look at each one; I just separated them and put them into envelopes.
>
> Q. You don't remember which document you put in which envelope? A. No. I do not.
>
> Q. According to your testimony, there was an original and a duplicate of claims for two years for two taxpayers, and you don't recall which documents went into which envelopes? A. No, they were both addressed to the same address: Collector of Internal Revenue."

The possible division of claims were David's for 1944 and 1945 in one envelope, and Herbert's in the other; or David's and Herbert's for 1944 in one envelope and the 1945 claims for both taxpayers in the other. The fact that Rossman did not notice how the separation was made is immaterial. The important fact is that claims for both 1944 and 1945 for David and Herbert were timely mailed to the Collector of Internal Revenue.

In *Jones* v. *United States*, supra, based upon *oral testimony* of the preparation and mailing, the Ninth Circuit held the presumption of receipt by the Collector's Office was not rebutted by the failure to find a record of the claim in the Collector's Office.

The Court below erred when it accepted as conclusive the recollection in 1959 of an employee of the defendant as

to procedures in the mail department in 1950, particularly when said employee had never worked in said department nor was shown to know what transpired in said department. Upon such testimony the majority of the Court believed the loss of claims by the Collector was most unlikely. Yet, when taxpayers attempted to rebut such testimony by other oral testimony and documentary proof of admitted loss of claims by the same Collector's Office, such testimony was held inadmissible. Exception was taken to such ruling and petitioners contend such ruling deprived them of due process of law (Tr. 119-120).

The Court below erred further when it held defendant had not received constructive notice within the statutory time that refunds were due to David and Herbert Rosengarten for 1945. Petitioners' position is that the defendant was aware the partnership issue pertained to both 1944 and 1945. The returns of David, Herbert and Walter for both years were examined at the same time by the same agent and deficiencies in tax simultaneously determined. The Revenue Agent who determined the overassessments of David, Herbert and Walter did so for 1944 and 1945 simultaneously although David's and Herbert's overassessments were not refunded because the Collector could not find the claims for that year in his office. Since the overassessments for 1945 did not involve the ascertainment of any facts but were merely a matter of computation which had been made by the Agent, the Government's position has not been prejudiced in any manner, even if the "amended" claims filed in 1953 are deemed to be the first formal claims for refund.

Petitioners believe their position is supported by the decision in *Newton* v. *United States* (Ct. Cl. 1958) 163 F. Supp. 614. The essence of that decision was that a refund should not be denied where the Government was not prejudiced in any way by the taxpayers' failure to file a separate formal claim for a particular year when the *same* issue was

pending with regard to an earlier year and the *Government was aware of it.*

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX A

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In the United States Court of Claims

Nos. 307-50 and 308-50

(Decided March 2, 1960)

HERBERT ROSENGARTEN v. THE UNITED STATES

DAVID ROSENGARTEN v. THE UNITED STATES

Mr. Bernard Weiss for the plaintiffs.

Mr. H. S. Fessenden, with whom was *Mr. Assistant Attorney General Charles K. Rice*, for the defendant. *Messrs. James P. Garland* and *W. Carr Ferguson* were on the brief.

OPINION

JONES, *Chief Judge*, delivered the opinion of the court:

These actions for the recovery of income taxes for the year 1945, $34,837.90 plus interest as to plaintiff Herbert Rosengarten, and $10,104.38 plus interest as to plaintiff David Rosengarten, have been consolidated by stipulation because of the similarity of the questions presented.

During the years 1944 and 1945 plaintiffs were members of a family partnership, the Herbert Manufacturing Co. of New York City. Each filed a Federal income tax return for 1945 on March 13, 1946, and subsequently paid the liabilities due thereon. In 1947, the Internal Revenue Service determined that the family partnership would be disallowed. Consequently, the profits of the partnership for a period including 1944 and 1945 were redistributed among the permitted partners of the Herbert Manufacturing Co.

and deficiences for those years were asserted against plaintiffs. The 1945 deficiencies were discharged by credits and cash payments during 1948, 1949, and 1951. Plaintiff Herbert Rosengarten made a final payment of $3,137.38 on July 16, 1951, and plaintiff David Rosengarten made a final payment of $2,177.86 on July 15, 1951.

On February 7, 1950, each plaintiff filed a claim in duplicate for refund for the year 1944 with the Collector (now District Director) of Internal Revenue for the Third District of New York. The claims alleged that the disallowance of the family partnership was legally erroneous in the light of certain recent decisions and rulings. On March 3, 1950, refund claims for 1944 and 1945 were filed in behalf of Walter Rosengarten, brother and co-partner of plaintiffs, who had been deceased since February 1946, alleging the same grounds as those offered in plaintiffs' 1944 claims.

In June 1953, plaintiffs' returns for 1944 and 1945 were re-examined and, based on a favorable reconsideration of the family partnership question, overassessments were recommended for 1944 and 1945. The 1944 claims were allowed and the refunds were applied in part, by consent of the plaintiffs, to deficiencies owed by members of their respective families. Refund of the overassessments for 1945 was denied on the ground that neither plaintiff had timely filed a refund claim as required by section 322(b)(1), Internal Revenue Code of 1939.[1]

On inquiry, plaintiffs were informed that the Collector for the Third District had no record of any claim for 1945 having been filed by either plaintiff. Thereafter, a claim and an amended claim for 1945 were filed on July 2, 1953, and December 27, 1954, respectively, by each plaintiff

[1] 26 U.S.C. 322(b)(1) 1952 Ed.

These overassesments of $34,837.90, as to Herbert, and $16,104.38, as to David, have not been refunded by the defendant and they form the subject matter of these consolidated suits.

Plaintiffs' claims for 1944 were prepared in pencil by an employee of an accounting firm who had them typewritten in duplicate after checking the pencil copy. Claims for 1945 were prepared in duplicate at the same time based on the same theory. The original and duplicate claims for both plaintiffs for both years were hand-carried by another employee of the accounting firm to the plaintiffs' place of business where they signed the documents presented to them.

At about the same time the accounting firm prepared claims for Walter Rosengarten for 1944 and 1945 for execution by his administratrix. These claims were also prepared in pencil, then typed in duplicate. The Walter Rosengarten claims were signed at a different time and were filed with the Collector.

It has not been shown whether plaintiffs' 1944 claims which admittedly were properly filed arrived at the Collector's office in one envelope or more than one.

It is plaintiffs' contention that the evidence supports their position that the 1945 claims, as well as those for 1944, were filed within the statutory period. As an alternative theory, they assert that the claims filed in July 1953, and December 1954, were merely formalizing statements of the legally sufficient informal claims for refund for 1945 contained by implication in their own claims for 1944 and Walter's claims for 1944 and 1945.

Section 322(b)(1) of the 1939 Code, on which the Collector based his denial, states that unless a claim for refund be filed within three years of the filing of the return for that year or within two years of the payment of the

tax, no refund will be made or credit allowed.[2] This section would seem to prohibit the Commissioner of Internal Revenue from making a refund in the absence of compliance with its provisions. Indeed, it has been held that a Government official has no power to waive the statute of limitations in this type of situation. *United States* v. *Garbutt Oil Co.*, 302 U.S. 528 (1938). If then, as defendant maintains, the first claim for the 1945 tax year was not filed by either plaintiff until July 1953, at the earliest, there was no claim filed either within three years of the returns or within two years of the payments thereon (except as to the final deficiency installment payments of July 1951).

Plaintiffs direct our attention to a line of cases, the most recent of which is the case in the Ninth Circuit, *Jones* v. *United States*, 226 F. 2d 24 (1955), which are to the effect that a strong presumption of receipt arises where there is evidence of proper preparation, addressing, and mailing of

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[2]The cited section of the 1939 Code provides, in pertinent part

"Sec. 322. REFUNDS AND CREDITS.

"(b) *Limitation on allowance*—(1) *Period of Limitation*.—Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

"(2) *Limit on amount of credit or refund*

"The amount of the credit or refund shall not exceed the portion of the tax paid—

"(A) If a return was filed by the taxpayer, and the claim was filed within three years from the time the return was filed, during the three years immediately preceding the filing of the claim.

"(B) If a claim was filed, and (i) no return was filed, or (ii) if the claim was not filed within three years from the time the return was filed the taxpayer, during the two years immediately preceding the filing of the claim." [26 U.S.C. 322 (1952 Ed.).]

a claim for refund to the proper tax official. It has also been held that this presumption may be strong enough to overcome the presumption that a Government official has acted correctly or determined properly in respect to an official act.

All of the cases cited by plaintiffs, *Detroit Automotive Products Corp.* v. *Commissioner*, 203 F. 2d 785 (1953); *Crude Oil Corp.* v. *Commissioner*, 161 F. 2d 809 (1947); *Haag* v. *Commissioner*, 59 F. 2d 516 (1932); and *Hudson* v. *United States*, 92 F. Supp. 555 (1950), have in common the fact that the trial court was offered compelling evidence of correct preparation, signing, addressing, stamping, etc., of the claim while, at the same time, the Government was able only to offer evidence of a purely negative character, i.e., that the tax collector had no record of such claim having been filed in his office. The instant case differs, however, in regard to the evidence concerning those vital facts.

We are satisfied that claims for both plaintiffs for 1944 and 1945 were prepared in duplicate by the accounting firm. As a matter of fact, those for the year 1944 were received by the Collector and were stamped, logged, numbered and attached to the returns to which they pertained. We think that the claims for both years were signed by the plaintiffs when presented to them by the employee of the accounting firm. Moreover, the evidence to that effect is uncontroverted. The evidence as to what happened thereafter is less compelling.

Mr. Rossman, from the accounting firm, testifying some eight years and nine months after the fact, indicated that he knew in general terms that he was presenting original and duplicate claims for 1944 and 1945 to each plaintiff to be signed. He testified that they were signed and notarized and that two envelopes were prepared at his direction

for mailing to the Collector Internal Revenue. His recollection as to which of the documents were placed in which envelopes, the manner of affixing the stamps and where and when he mailed the envelopes is far less categorical. He could not definitely and explicitly describe his handling of these all important documents; indeed, this is not unusual after a lapse of so many years. Moreover, we are aware of cases holding that there was a failure of filing notwithstanding evidence of timely filing where the evidence consisted of a personal recollection of events which were supposed to have transpired several years before. *Worden & Co. v. United States*, 80 C. Cls. 550 (938). The character of this portion of the evidence, relating to the mechanics of the alleged filing by mail of the 1945 claims, is not such as would lead us to say that a presumption of due delivery and receipt by the defendant has arisen. The evidence tending to show delivery of a claim to the Commissioner or his agent must be strong enough to suggest that it is highly probable that the filing has taken place. Otherwise no presumption will be indulged.

In any event, a presumption based on such evidence would not prevail against the evidence offered by the Government as to the general and specific procedures of the local Internal Revenue office. The defendant has not merely shown that it has no record of the claims at issue; it has shown that it is extremely doubtful that the claims ever, in fact, found their way to the office. We are not prepared to say that it is impossible for the claims to have been lost or mislaid in the office of the Collector after they had been received. But we do think, based on the evidence before us, that such eventuality was most unlikely.

Defendant has introduced evidence concerning the step-by-step treatment of incoming mail, particularly as to claims, in the Office of the Collector for the Third District of New

York. Throughout the handling process of such documents various indexing and registry procedures are taken. It is virtually impossible for any in-coming document to be discarded with its envelope because of the practice of viewing every opened envelope over a glass slope. It will be noted that it is possible for both of Mr. Rossman's envelopes to have reached the Collector's office containing only the plaintiff's 1944 claims.

Applying the evidentiary facts to the law as we understand it, we must conclude that the plaintiff's evidence is not so compelling as to excuse the proof of actual filing in compliance with the statute on a theory of presumptive filing. It is with reluctance that we hold as we must in view of the admitted right of the plaintiffs, but for the failure of filing to the claim before this court. This is all the more so since they themselves are not responsible for the forfeiture of the refund. They merely entrusted the purely mechanical end of their fiscal affairs to their accountants which is certainly a reasonable course for busy industrialists.

The alternative argument, that the 1953 and 1954 claims served to perfect informal claims previously presented through the media of plaintiff's 1944 claims and the 1944 and 1945 claims of Walter Rosengarten, also fails when the specific facts are tested by the law.

There are a number of reasons why it has been said that "[T]he filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the . . . United States." *United States* v. *Felt & Tarrant Co.*, 283 U.S. 269 (1931), *Aplington* v. *United States*, C. Cls. No. 375-57, decided January 14, 1959.[3] Perhaps the strongest justification for this rule to insure that the Commissioner, a representative of the Government's fiscal struc

[3] Certiorari denied October 12, 1959, 361 U. S. 821

ture, will be put on notice of refund claims so that it can reasonably be predicted what revenues will be available to meet the estimated liabilities.

An informal claim timely filed which fairly gives notice of a taxpayer's intention to press for a refund of taxes has been held to be sufficient to satisfy the statute, even if the formalizing of that claim is not accomplished until after the statute has run. This doctrine has been applied in this court and most of the other Federal courts. *United States* v. *Kales*, 314 U.S. 186 (1941); *Crenshaw* v. *Hicks*, 237 F. 2d 372 (1956); *Cumberland Portland Cement Co.* v. *United States*, 122 C. Cls. 580 (1952).

Those and other cases acknowledge that a specific taxpayer may claim a refund for a specific year in a formal fashion even beyond the limitation period if the claim relates back to an informal claim filed by that taxpayer for that year within the limitation period. We are aware of no case, however, where a court has held that a request for refund for a particular year constituted a claim for *another* year, nor any case in which a claim for refund by a specific taxpayer constituted an informal claim for that year on behalf of a *different* taxpayer. Yet that is what plaintiffs would have us hold in this case.

The suggested bases for the plaintiff's alleged informal claims for 1945 are their own claims for 1944 and those of their brother for 1944 and 1945. These, they insist, formed an ample basis on which the Commissioner might have surmised that plaintiffs were also claiming for 1945 since a favorable determination of the family partnership question presented in the claims actually filed would have entitled them to a refund for 1945 as well as 1944. This, in effect, would admit of a theory of filing by inaction.

If we are to hold that a certain act constitutes an informal claim alerting the Commissioner to a potential demand for refund which will satisfy the requirements of

section 322(b) of the Code, the act must be clear and explicit. An act which merely makes it possible for the Commissioner to discover the existence of a claim if he makes an independent investigation and sorts out the clues will not do. The cases supporting plaintiff's position all reveal that the device considered an informal claim was some definite instrument, a letter of transmittal, a waiver form, a qualification attached to a check, or the like, which indicated that the taxpayer questioned a tax payment which he had made for a particular year. Each device embodied a clarity which insured that the Commissioner would not be misled.

Before we can hold that there has been an informal claim filed within the statutory period, we must be satisfied that it contains the means by which the Commissioner will be apprised that a certain tax is being contested without resort to any extraneous factors. Notwithstanding the fact that the result of our holding is to deprive plaintiffs of the major part of a refund to which, on the merits of the claim, they are apparently entitled, we hold that the record does not establish in a satisfactory manner that a claim as to the refund of 1945 income taxes was filed by either plaintiff before July 2, 1953.

Plaintiffs' final payments of $2,177.80 and $3,137.38 on the 1945 tax liabilities were made on July 15 and 16, 1951. Under section 322(b) which authorizes recovery of taxes paid within two years of the filing of a claim (not to exceed the amounts paid within the two years) plaintiffs are entitled to judgment for those sums. In its brief, the defendant, in effect, admits this but states that refunds as to those amounts were not made because of plaintiffs' refusal to agree to offset against the deficiencies of the partnership members of their respective families. We find in the statutes no legal bar to plaintiffs' recovery of the sums paid on July 15 and July 16, 1951.

For the foregoing reasons judgments will be entered for the plaintiffs in the following amounts: plaintiff Herbert Rosengarten, $3,137.38; plaintiff David Rosengarten, $2,177.80, with interest on each as provided by law.

It is so ordered.

REED, *Justice (Ret.)*, sitting by designation, and LARAMORE, *Judge*, concur.

WHITAKER, *Judge*, took no part in the consideration and decision of these cases.

MADDEN, *Judge*, with whom LITTLETON, *Judge (Ret.)*, joins dissenting.

The court has felt obliged to decide that claims of these plaintiffs, concededly otherwise valid, must be rejected because, the court concludes, the plaintiffs did not file claims for refund within the period of time set by the statute for filing such claims.

We think the evidence points more strongly to the conclusion that the plaintiffs did file timely claims for refund. The court finds:

> Plaintiffs' claims for 1944 were prepared in pencil by an employee of an accounting firm who had them typewritten in duplicate after checking the pencil copy. Claims for 1945 were prepared in duplicate at the same time based on the same theory. The original and duplicate claims for both plaintiffs for both years were hand-carried by another employee of the accounting firm to the plaintiffs' place of business where they signed the documents presented to them.

The foregoing events occurred on February 7, 1950. In June 1953 the revenue office, having concluded that the plaintiffs were entitled to refunds for both 1944 and 1945,

found the claim for refund for 1944 but was unable to find any such claim for 1945.

In this state of the evidence, the court concludes that the claim for 1945, though typed for and signed by the plaintiffs, was not sent to the revenue office, though the 1944 claim, signed at the same time, was sent.

To reach this conclusion, one must suppose that the plaintiffs were so careless of their claims for some $50,000 that they allowed the papers necessary to support those claims to be lost, although at the same instant of time they carefully mailed other papers of the same import relating to the preceding year. We think the foregoing supposition is quite violent.

To reach the opposite conclusion, one has to suppose only that the revenue office is not infallible in its handling of the tens of thousands of papers which it receives; that two papers out of those tens of thousands may have been misfiled and thereby lost. This supposition seems to us to contain no element of violence. On the contrary, it is consistent with the experience of every person who has had numerous dealings with large and impersonal organizations, public and private, handling myriads of documents.

We would not reject a just claim on the sole ground that the Internal Revenue Department could not find a paper relating to it three years after, according to trustworthy evidence, it was sent to that office. We would await the further development of automation before we would conclude that the Internal Revenue Department is immune from human error.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner William E. Day, and the briefs and argument of counsel, makes findings of fact as follows:

Opinion of United States Court of Claims

Herbert Rosengarten

1. Plaintiff, Herbert Rosengarten, is an individual residing at 22 Gramercy Park South, New York, N. Y. During 1944 and 1945 plaintiff was a partner in the partnership, Herbert Manufacturing Co., whose place of business was located at 229 West 36th Street, New York, N. Y.

2. Plaintiff, on March 13, 1946, filed his Federal income tax return for the calendar year 1945 on a cash basis with the Collector of Internal Revenue for the Third New York District (now District Director of Internal Revenue, Upper Manhattan), reporting thereon net taxable income of $102,309.77, and a tax liability of $49,612.61, which was duly assessed and paid to the said Collector.

3. After an examination of plaintiff's Federal income tax returns and records for the calendar years 1944 and 1945, the net income and tax liability for each year were revised in accordance with revenue agent's report dated June 13, 1947, transmitted to plaintiff by letter of the Internal Revenue Agent in Charge, dated December 11, 1947. Pursuant to a waiver of restrictions on assessment and collection filed by plaintiff on June 13, 1947, the income tax deficiencies for the years 1944 and 1945 of $33,018.37 and $38,780.40, respectively, shown in the revenue agent's report, were duly assesed and paid together with interest thereon. The deficiency of $38,780.40, together with interest thereon of $4,166.09 for the year 1945, was paid by plaintiff as follows:

3 24 48	$25,632.70	In cash
7 6 49	9,531.91	By credit
7 6 49	3,611.45	By credit
7 6 49	3,611.45	By credit
11 3 49	422.94	By credit
7 16 51	3,137.38	In cash

Opinion of United States Court of Claims

4. Plaintiff filed a claim for refund in the amount of $23,807.47 for the year 1944, which was dated February 6, 1950 and received by the Collector of Internal Revenue for the Third District of New York on February 7, 1950. The claim was grounded upon the assertion that the additional tax on 1944 income resulting from the disallowance of certain members of a partnership was assessed in error in the light of recent decisions and rulings. An unsigned duplicate copy of this claim for refund was also received by the Collector on February 7, 1950.

5. A re-examination of plaintiff's Federal income tax returns for the calendar years 1944 and 1945 was made by a revenue agent [illegible] in his report dated June 22, 1953, which was duly filed by plaintiff under date of October 23, 1953, as determined a re-assessment of tax in the amount of $20,021.41 for the year 1944 and $34.87-90 for 1945. The latter amount was held to be barred from recovery on the ground that a claim for refund was not timely filed. Under date of June 19, 1953, plaintiff filed a waiver of restriction and consent to the assessment for the year 1944 and [illegible] application of part thereof against deficiencies in the income tax of related taxpayers which resulted from the revision of plaintiff's net taxable income. The balance of the overassessment of tax and interest for the year 1944 has been refunded to plaintiff with interest thereon and is not in issue or included in this action.

6. On July 2, 1953, plaintiff filed a claim for refund in the amount of $28,770.14 for the year 1945. On December 27, 1954 plaintiff filed another claim for refund in the amount of $34,837.90 for the year 1945.

7. By letter dated November 4, 1955, plaintiff was advised of the proposal to reject the claims for refund filed July 2, 1953 and December 27, 1954, but he was given thirty days to file a protest. Under date of November 25, 1955, plaintiff filed a protest of the proposed rejection of the refund claims and requested a conference with the Appellate Division of the Office of the Regional Commissioner. After a hearing, plaintiff was advised by letter dated February 28, 1956 that the two claims for refund for the year 1945 would be disallowed. Thereafter, by letter dated March 23, 1956, the statutory disallowance of the two refund claims was given to plaintiff by registered mail as provided in Section 3772(a)(2) of the Internal Revenue Code of 1939.

David Rosengarten

8. Plaintiff, David Rosengarten, is an individual residing at 60 Gramercy Park North, New York, N.Y. During 1944 and 1945 plaintiff was a partner in the partnership, Herbert Manufacturing Co., whose place of business was located at 220 West 30th Street, New York, N.Y.

9. Plaintiff, on March 15, 1946, filed his Federal income tax return for the calendar year 1945, on a cash basis with the Collector of Internal Revenue for the Third District of New York (now District Director of Internal Revenue, Upper Manhattan District, New York, N.Y.), reporting thereon net taxable income of $27,518.08 and a tax liability of $11,502.34, which was duly assessed and paid to the said Collector.

10. After an examination of plaintiff's Federal income tax returns and records for the calendar years 1944 and 1945, the net income and tax liability for each year were

revised in accordance with revenue agent's report dated June 13, 1947, transmitted to plaintiff by letter of the Internal Revenue Agent in Charge, dated December 11, 1947. Pursuant to a waiver of restrictions on assessment and collection filed by plaintiff on June 13, 1947, the income tax deficiencies for the years 1944 and 1945 of $15,050 and $18,782.11, respectively, shown in the revenue agent's report were duly assessed and paid together with interest thereon. The deficiency of $18,782.11, together with interest thereon of $2,148.24 for the year 1945, was paid by plaintiff as follows:

Date	Amount	Paid
3 24 48	$10,741.69	In cash
7 30 48	3,500.51	By credit
7 6 49	653.00	By credit
7 6 49	732.00	By credit
7 6 49	888.02	By credit
7 6 49	989.13	By credit
7 6 49	989.13	By credit
11 3 49	115.70	By credit
11 3 49	137.31	By credit
7 15 51	2,177.86	In cash

11. Plaintiff filed a claim for refund in the amount of $8,370.75, for the year 1944, which was dated February 6, 1950, and stamped received by the Collector of Internal Revenue for the Third District of New York on February 7, 1950. The claim was grounded upon the assertion that the additional tax on 1944 income, resulting from the disallowance of certain members of a partnership, was assessed in error in light of recent decisions and rulings. An unsigned duplicate copy of this claim for refund was also received by the said Collector on February 7, 1950.

12. A re-examination of plaintiff's Federal income tax returns for the calendar years 1944 and 1945 was made by

a revenue agent, and in a supplemental report dated June 22, 1953, which was forwarded to plaintiff under date of October 23, 1953, he recommended an overassessment of tax in the amount of $12,943.28 for the year 1944, and $10,104.38 for 1945. The latter amount was held to be barred from recovery on the ground that a claim for refund was not timely filed. Under date of June 19, 1953, plaintiff filed a waiver of restrictions and acceptance of overassessment for the year 1944, and consent to application of part thereof against deficiencies in tax for such year of related taxpayers which resulted from the revision in plaintiff's net taxable income. The balance of the overpayment of tax and interest for the year 1944 has been refunded to plaintiff with interest thereon, and for that reason is not included in this action.

13. On July 2, 1953, plaintiff filed a claim for refund in the amount of $12,919.55 for the year 1945. On December 27, 1954, plaintiff filed another claim for refund in the amount of $10,104.38 for the year 1945.

14. By letter dated November 4, 1955, plaintiff was advised of the proposal to reject the claims for refund filed July 2, 1953 and December 27, 1954, but he was given thirty days to file a protest. Under date of November 25, 1955, plaintiff filed a protest of the proposed rejection of the refund claims and requested a conference with the Appellate Division of the Office of the Regional Commissioner. After a hearing, plaintiff was advised by letter dated February 28, 1956, that the two claims for refund for the year 1945 would be disallowed. Thereafter, by letter dated March 23, 1956, the statutory disallowance of the two refund claims was given to plaintiff by registered mail as provided in Section 3772(a)(2) of the Internal Revenue Code of 1939.

FINDINGS RELATED TO BOTH PLAINTIFFS

15. The Herbert Manufacturing Co. was a family partnership engaged in the business of converting rayon fabrics. The brothers, Herbert Rosengarten, David Rosengarten and Walter Rosengarten, were the senior partners. Their respective wives and children became partners in 1941, when the three senior partners each gave them interests in the partnership, and filed gift tax returns for the interests so conveyed. All the members of the partnership filed Federal income tax returns for each of the years 1944 and 1945, and reported their distributive shares of the partnership profits and paid the resulting income tax thereon. After an examination, the revenue agent in reports dated June 13, 1947, disallowed the family partnership for the years 1944 and 1945, and distributed the partnership profits among the three senior partners, Herbert, David and Walter Rosengarten. The resulting deficiencies for each year were assessed against the three brothers and overpayments scheduled for the disqualifying partners were applied as credits in payment of the deficiencies. After the filing, on February 7, 1950, of the 1944 claims for refund by Herbert and David Rosengarten, and the filing, on March 3, 1950, of claims for refund for the years 1944 and 1945 on behalf of Walter Rosengarten, who had died on February 10, 1946, a re-examination was made by a revenue agent. Upon reappraisal of the facts regarding the family partnership, the revenue agent concluded that the family partnership interest. The fololwing tabulation shows the interest among the various members in proportion to their partnership interest. The following tabulation shows the interest of each partner and the income attributable to each for the year 1945:

Name of partner in partnership	Percentage of partnership interest	Share of partnership income: Reported on return	Share of partnership income: Revised per 3AR 6-25-51
Herbert Rosengarten (Brother of David and Walter)	20	$ 57,920.61	$ 63,727.07
Clae Rosengarter (Wife of Herbert).	13	25,064.80	21,463.53
Trust for benefit of Frank Rosengarten (Son of Herbert).	6 9/16	12,532.41	10,731.85
Trust for benefit of Johanne Rosengarten (Daughter of Herbert).	6 9/16	12,532.41	10,731.85
David Rosengarten (Brother of Herbert and Walter).	13 3/4	34,058.37	38,085.64
Eva Rosengarten (Wife of David).	6 7/16	13,129.19	11,242.80
Charles Rosengarten (Son of David).	2 7/24	4,376.39	3,747.54
Trust for benefit of Elliott Rosengarten (Son of David).	2 7/24	4,376.39	3,747.54
Trust for benefit of Frances Lillian Rosengarten (Daughter of David).	2 7/24	4,376.39	3,747.54
Walter P. Rosengarten Brother of Herbert and David).	10	25,597.00	31,953.17
Cecile A. Rosengarten (Wife of Walter).	10	19,097.00	16,353.17
Totals	100	$213,069.96	$215,531.70

The claims for refund filed for Walter Rosengarten for both the years 1944 and 1945 were allowed, but part of resulting refund was applied as a credit against the deficiencies asserted for these years against the partner members of his family. The claims for refund filed by Herbert and David Rosengarten for the year 1944 were allowed, but part of the refunds was applied as a credit against the de-

ficiencies asserted against their partner families. The 1945 claims for refund filed July 2, 1953 by Herbert and David Rosengarten were timely to the extent of payments made within two years of their filing date, which were $3,137.38 for Herbert and $2,177.80 for David. These amounts were not refunded.

16. Claims for refund for the years 1944 and 1945 were prepared in pencil for plaintiffs Herbert and David Rosengarten by an employee of the accounting firm of George Muhlstock & Co. of New York City. After checking calculations and making changes therein, the four claims for refund were typewritten in duplicate and were then given to another employee, Samuel J. Rossman, with instructions to have them signed by the two plaintiffs, notarized, and then send them to the Collector of Internal Revenue at 110 East 45th Street.

17. Penciled claims for refund for the years 1944 and 1945 were prepared by the same employee of the accounting firm for Walter Rosengarten, deceased. The first draft of such claims for refunds was prepared on the same day as those for Herbert and David. Corrections were necessary and they were accomplished the next day, after which typewritten copies were made. Since these claims for refund were prepared for signature of the widow of Walter, who was administratrix of the estate, arrangements were made for the administratrix to come to the office of the accounting firm to sign the claims for refund for the years 1944 and 1945 on behalf of Walter, deceased. The original of these claims was filed on March 3, 1950. No evidence has been submitted showing the method or manner of filing these two claims on behalf of Walter Rosengarten, deceased, or by whom they were signed. The months of February and

March, 1950 were in the tax period and the employees and members of the accounting firm were quite busy.

18. Upon being entrusted with the prepared claims for refund, Mr. Rossman carried them to the Herbert Manufacturing Co. and notified Herbert and David Rosengarten through their secretaries that he had some forms for their signature. The two brothers assembled in Herbert's office and signed their names to documents placed before them after which their signatures were notarized. Herbert and David Rosengarten paid no further attention to the documents after placing their signatures thereon. They presumed that either Mr. Rossman or the secretary picked them up. David Rosengarten thereafter requested Mr. Rossman to give him a memorandum explaining what he had signed which he did approximately a half hour later. The memorandum stated that David had signed claims for refund for the years 1944 and 1945. Mr. Rossman picked up the documents, requested the secretary to address two envelopes to the Collector of Internal Revenue, separated the documents and put them in such envelopes. After stamping the envelopes, Mr. Rossman stated he put them in his pocket and when he went out to lunch put them in a mail box on the corner. There is no evidence that on or about February 6, 1950, anyone in the accounting firm conferred with Mr. Rossman upon his return from the Herbert Manufacturing Co. concerning the documents upon which he was to secure signatures.

19. The original and duplicate claims for refund filed by David and Herbert Rosengarten for the year 1944 were stamped received February 7, 1950 in the mail room of the Collector of Internal Revenue, Third District, New York. These refund claims were then forwarded to the claims sec-

tion of that office and given the same file number as had previously been assigned to the 1944 income tax return of each plaintiff. The claims for refund and the returns of these two plaintiffs were transmitted to the audit division of the New York Internal Revenue Service, Third District, for their disposition. Upon receipt of these refund claims in the claims section, 813 cards were prepared which gave the name, address, account number of each plaintiff and the date the claims were received which became the permanent record. There was also placed upon the assessment list a stamp showing that a claim for refund was filed by each plaintiff for the year 1944.

20. There is no evidence showing receipt by the Internal Revenue Service of the 1945 claims for refund of Herbert and David.

21. During the year 1953, a claims examiner in the office of the Internal Revenue Service, Third District of New York was contacted by a representative of David and Herbert Rosengarten concerning the filing of claims for refund by these plaintiffs for the year 1945. After a thorough check of the open and closed 813 files and the assessment lists and every known source, the claims examiner informed the representative that there was no record in the office of the Internal Revenue Service that plaintiffs had filed refund claims for the year 1945. A search was also made of the correspondence file, but there was no record of a transmittal letter accompanying any claims for refund mailed in by plaintiffs during the year 1950. The claims examiner further checked all records to ascertain whether there had been an incorrect association of refund claims and returns for 1944 and 1945 of plaintiffs when forwarding to the audit division, but the records failed to disclose an improper association.

22. When claims for refund and returns were received through the mail by the Internal Revenue Service during the year 1950, the envelopes were placed over a glass scope to ascertain that no document was left therein after which they were destroyed. By reason of this precaution, there is serious doubt that plaintiffs' claims for refund for the year 1945 were lost in the office of the Internal Revenue Service

23. It is found that no claims for refund for 1945 were filed on behalf of Herbert and David Rosengarten, until July 2, 1953.

24. Under date of July 2, 1953, claims for refund were filed by David and Herbert Rosengarten for the year 1945 which were accompanied by an original and a copy of transmittal letters. Received stamp dated July 2, 1953 by the Director of Internal Revenue was placed on each copy of the transmittal letter and these were returned to plaintiffs' representative. On December 27, 1954, plaintiffs filed amended claims for refund for the year 1945, which were likewise accompanied by an original and copy of a transmittal letter, upon which the Director of Internal Revenue placed a received stamp. The copy was returned to plaintiffs' representative. Although the transmittal letters of July 2, 1953 refer to a duplicate copy of the claims for refund, there is no evidence of their receipt by the Internal Revenue Service. These refund claims were associated with the returns, 815 cards were made, a received stamp was placed upon the assessment lists, and they were sent to the audit division for disposition. Thereafter, rejection letters were issued on the refund claims.

25. Refunds of $3,137.38 for Herbert, and $2,177.80 for David for the year 1945 were not made by the Internal

Revenue Service because plaintiffs would not agree to offset for deficiencies due by their family partner members of the partnership.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiffs are entitled to recover, and it is therefore adjudged and ordered that plaintiff Herbert Rosengarten (No. 307–50) recover of and from the United States the sum of three thousand one hundred thirty-seven dollars and thirty-eight cents ($3,137.38), with interest thereon as provided by law, and it is adjudged and ordered that plaintiff David Rosengarten (No. 308–50) recover of and from the United States the sum of two thousand one hundred seventy-seven dollars and eighty-six cents ($2,177.86), with interest thereon as provided by law.

IN THE

UNITED STATES COURT OF CLAIMS

HERBERT ROSENGARTEN, *Plaintiff*, v. UNITED STATES, *Defendant*.	No. 307-50
DAVID ROSENGARTEN, *Plaintiff*, v. UNITED STATES, *Defendant*.	No. 308-50

MOTION BY THE PLAINTIFFS FOR REHEARING

The plaintiffs move for a rehearing on the question of whether plaintiffs filed timely claims for refund for the calendar year 1945 for the following reasons:

1. In its decision this Court stated (page 3) "Section 322(b)(1) of the 1939 U. S. Internal Revenue Code, on which the Collector based his denial, states that unless a claim for refund be filed within three years of the filing of the return for that year or within two years of the payment of the tax, no refund will be made or credit allowed. This section would seem to prohibit the Commissioner of Internal Revenue from making a refund in the absence of compliance with its provisions." On page 7, this Court stated: "We are aware of no case, however, where a court has held a request for refund for a particular year constituted a claim for *another* year. * * *"

Plaintiffs' Motion for Rehearing

Plaintiffs submit to the Court for its consideration on this point its own *unanimous* decision in *Nexeton* v. *United States* 103 F. Supp. 614. In that case, the question of alimony deduction was common to the years 1944, 1945 and 1946, but the taxpayer had only filed a timely claim for refund for 1944. Claims for refund for 1945 and 1946 were filed after the expiration of the statutory period. Though formal requirements of refund claims had not been met, this Court was of the opinion, in view of the background of the case, the Government had not been prejudiced, it has been on notice, and allowed the refund. The protest of that taxpayer to the proposed deficiencies cannot be considered the determining factor for an informal claim for refund since said protests were filed prior to the payment of any deficiencies in tax. Many protests to proposed deficiencies never ripen into claims for refund even though the issue is decided against the taxpayer.

The underlying principle inherent in the *Nexeton* case was whether the Government was in any way prejudiced by the taxpayer's failure to file a separate formal claim for a particular year when the same issue was pending with regard to an earlier year and *the Government was aware of it.*

Applying said principle to the case of the Rosengartens should result in a determination favorable to the plaintiffs. The Government was certainly aware the partnership issue covered both 1944 and 1945. The returns of the three partners for both years were examined simultaneously by the same agent. The original deficiencies for both years were simultaneously determined. The revenue agent who determined the overassessments of the three partners for 1944 simultaneously determined the overassessments for 1945. However, the amounts of overassessments with respect to two of the partners, the plaintiffs here, were not refunded

due to the failure of the Collector to mail the claims in his office. Certainly, the very fact of the determination of the overassessments (Exhibit C or stipulation of each plaintiff) proves the Government associated both years together. Since the overassessment for 1945 did not involve the ascertainment of any facts but was merely a matter of computation, how could the alleged late filing of the claim for refund have prejudiced the Government's position in any manner?

2. In rejecting plaintiffs' contention that claims for 1945 were timely filed on or about February 7, 1950, this Court stated:

> It (the defendant) has shown that it is extremely doubtful that the claims ever, in fact, found their way to the office. We are not prepared to say that it is impossible for claims to have been lost or mislaid in the office of the Collector after they have been received. But we do think, based on the evidence before us, that such eventuality was most unlikely.
>
> Defendant has introduced evidence concerning the step-by-step treatment of incoming mail as to the claims in Office of the Collector for the Third District of New York * * * It is virtually impossible for any incoming document to be discarded with its envelope because of the practice of viewing every opened envelope over a glass scope. It will be noted that it is possible for both of Mr. Rossman's envelopes to have reached the Collector's office containing only the plaintiffs' 1944 claims.'

From the above quotation, it is quite evident this Court placed great stress on the Collector's Method of handling claims to show improbability, if not impossibility, of loss of claims for refund in the Third District of New York. This Court should take judicial notice that the Government

has a uniform operating procedure for all Collectors' offices in handling claims for refund. Court recognition of loss of claims in any one Collector's district establishes that possibility in another collection district.

In evaluating the testimony given by Miss Williams on the Collector's office procedures, it should be noted that she was a claims examiner whose duties in 1950 were to examine the claim for completeness, to see that proper signature was on the claim, the correct year, and that it showed everything that was necessary in order to process the claim" (Tr. 87). She was not in the mailroom in 1950 (Tr. 101, 102). Therefore her testimony with regard to mailroom procedures nine years earlier was not those she observed took place but only what she now thought was supposed to take place at that time and even that description was qualified by the word "usually" (Tr. 103).

Miss Williams testified that receiving stamps were placed on claims for refund ordinarily in the mailroom (Tr. 88) or in the claims section, if not yet stamped (Tr. 89), and that the "received" stamp was placed on plaintiffs' 1944 claims in the mailroom (Tr. 89). She later stated the stamp number 53 did not belong to the claims section and in answer to the Trial Commissioner's question, "Did you find out whose it is?", Miss Williams replied, "Yes, it was supposed to have been the cashier's number" (Tr. 89, 90).

This reply probably contains the answer to the missing claims for refund. Somehow the claims for refund, together with the myriad of returns being filed at that time of the year, were received by or sent to the cashier's department and became separated, misfiled or lost. No part of the testimony of Miss Williams pertained to procedures of the cashier's department, nor did she make any check

to see if said claims could possibly have become attached to regular income tax returns.

3. The Court should have remanded the case to the Trial Commissioner to accept into evidence the testimony of Sidney Gelfand together with proofs (Tr. 120) with respect to the loss of claims for refund by the Collector of Internal Revenue, Third District of New York. This evidence would be particularly in point, since it went to the very heart of the question of the Collector's loss of claims for refund in the very district where this Court has found "that such eventuality was most unlikely." (p. 5)

4. No important factual distinction exists between the cases relied on by the plaintiffs and their own case pertaining to the preparation, signing and mailing of claims for refund. This Court acknowledges that claims for refund of both plaintiffs for 1944 and 1945 were prepared at the same time and were signed by plaintiffs when presented to them by Rossman, of the accounting firm. The Court considers Rossman's evidence after that to be less certain. However, Rossman's uncertainty was with respect to which claims went into which of two envelopes. There was no uncertainty that he had taken the *right forms* (two claims for each of two plaintiffs in duplicate), found them somewhat too bulky to put into one envelope, so put them into two envelopes properly addressed, personally placed the stamps thereon (Finding of Fact No. 18),[1] and mailed them.

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[1] 18. "* * * Mr. Rossman picked up the documents, requested the secretary to address two envelopes to the Collector of Internal Revenue, separated the documents and put them in such envelopes. After stamping the envelope * * *"

at the box on the street corner when he went to lunch (Tr. 51, 53). Since all of Rossman's other testimony regarding his taking of claims to plaintiffs' office, their signing of the claims, his advising plaintiffs what they signed, his placing of the claims for 1944 and 1945 into two envelopes addressed to the Collector of Internal Revenue, has all been corroborated and accepted by the Court, there is no legal reason to reject the same witness' testimony with regard to the posting, where said testimony is uncontroverted.

The mailing of all the claims in two envelopes is an unimportant detail. From the known facts, there are only two possibilities: namely, Herbert's claims for 1944 and 1945 in duplicate were in one envelope and David's in the other, or David's and Herbert's claims for 1944, in duplicate, were in one envelope and the claims for 1945 were in the other. If the first situation prevailed, the 1945 claims could have been misattached, mislaid or lost in the cashier's office, as previously explained; if the second situation prevailed, the claims likewise could have become mislaid or misattached, or even the envelope containing the claims could have become lost in the Collector's office. Considering the time of year and multitude of mail being received at that time, even an unopened envelope could have dropped into a waste basket. Glass scopes over which all *opened* envelopes are viewed would not recover the contents of such dropped envelope.

It should be noted that this finding of fact that the taxpayer's claims for refund for 1944 and 1945 were all placed into two envelopes does not permit the possibility projected by the Court (p. 6) "It will be noted that it is possible for both of Mr. Rossman's envelopes to have reached the Collector's office containing only the plaintiffs' 1944 claims."

WHEREFORE, it is prayed that this Motion be granted.

BERNARD WEISS
Attorney for Plaintiffs
130 East 57th Street
New York 22, N. Y.

March 17, 1960

UNITED STATES COURT OF CLAIMS

HERBERT ROSENGARTEN, 307-56
DAVID ROSENGARTEN, 308-56

vs.

THE UNITED STATES

ORDER

These cases came before the Court on Motions for Rehearings, Amendments of Judgments or new trials under Rules 53 or 54 of the Rules of this Court and, on consideration thereof,

IT IS ORDERED this fourth day of May, 1960, that said Motions be and the same are overruled as follows:

* * * * * *

307-56 Herbert Rosengarten
308-56 David Rosengarten. Plaintiffs' motion.

* * * * *

BY THE COURT.

/s/ MARVIN JONES.

Marvin Jones
Chief Judge